

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEISHA L. MOCK)	
Claimant)	
VS.)	
)	Docket No. 1,034,349
SHAWNEE COUNTY)	
Self-Insured Respondent)	

ORDER

Claimant appealed the December 9, 2008, Award entered by Administrative Law Judge Brad E. Avery. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for claimant. Larry G. Karns of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges the work she performed for respondent between January 3 and March 31, 2007, either caused or, at the least, aggravated a right inguinal hernia to the extent it became symptomatic and required medical attention. In the December 9, 2008, Award, Judge Avery denied claimant's request for workers compensation benefits after finding that claimant had failed to prove she sustained an injury at work. The Judge specifically found that "claimant was unable to identify the cause of her hernia or the day on which it occurred."¹

¹ ALJ Award (Dec. 9, 2008) at 3.

Claimant maintains her symptoms were caused by her work duties; namely, the lifting, pushing, pulling and other strenuous activities she performed as a corrections specialist in the Shawnee County Jail. What is more, claimant argues it is irrelevant whether her work actually caused the hernia as the work certainly aggravated it over a period of time. In addition, claimant argues she provided respondent with timely notice of her injury as she promptly reported the hernia to respondent "[u]pon proper diagnosis."²

Conversely, respondent argues there is no proof that claimant suffered a series of injuries or accidents after she developed her initial hernia. Respondent also argues that the progressively worsening symptoms that claimant allegedly experienced before she underwent surgery in the latter part of March 2007 are not proof that her hernia was aggravated by work. In addition, respondent maintains that claimant's hernia pain began before her alleged work injury and that no doctor testified that her hernia worsened due to her work. Finally, respondent argues claimant knew she probably had a hernia on January 18, 2007; therefore, the notice she provided respondent in early February 2007 was untimely.

The issues before the Board on this appeal are:

1. Did claimant develop a hernia as a result of the work she performed for respondent or, in the alternative, did she aggravate a preexisting hernia such that it required medical treatment?
2. If so, did claimant provide respondent with timely notice of her injury?

FINDINGS OF FACT

After reviewing the entire record, the Board finds as follows:

Claimant works for the Shawnee County Department of Corrections as a corrections specialist. On or about January 3, 2007, claimant developed abdominal pain while at work. Claimant testified that she was pain-free when she went into work that day.

On January 18, 2007, claimant saw her personal physician, Dr. Michael K. Engelken, who is board-certified in family medicine, for a well-woman exam. Dr. Engelken wrote in his progress notes, among other things, that claimant had been experiencing recurrent pain in the right lower quadrant of her abdomen for more than a month and that she felt something was pushing out. Thinking claimant's symptoms were possibly from a

² Claimant's Brief at 2 (filed Jan. 15, 2009).

hernia, the doctor referred claimant to a surgeon, Dr. James J. Hamilton, Jr., to confirm the diagnosis.³

Claimant saw Dr. Hamilton on February 2, 2007. The history recorded by Dr. Hamilton indicated claimant was having pain in her right groin and that she had experienced discomfort lifting and straining. The doctor diagnosed a right inguinal hernia, which the doctor surgically repaired on March 22, 2007.

Following her appointment with Dr. Hamilton claimant notified respondent that she had a hernia, which she attributed to her work. According to claimant, she provided that notice to respondent on February 5, 2007. And on February 7, 2007, she signed an Officer's Report Sheet, which read:

I came to work on January the 3rd and I was feeling fine and sometime throughout my day I felt this pain in my stomach. I continued on with my day. Later that day I contacted my doctor to make an appointment. My doctor told me that I have a Hernia.⁴

Although she admits she does not know the actual date her groin complaints began, claimant is certain the pain began while she was at work. She attributes the hernia to work due to the lifting of heavy laundry bags and pushing loaded laundry and food carts. Moreover, she denies engaging in physical or strenuous activities outside of the workplace. Claimant selected January 3rd as the date of accident in her report as she was told she had to pick a certain date for the accident and she recalled doing laundry on that date.

Claimant testified this was the first hernia she had ever experienced and that she reported the hernia to respondent once she learned from Dr. Hamilton what was actually wrong with her. Moreover, claimant testified she continued working for respondent up until her March 22, 2007, surgery and that her pain progressively increased.

Dr. Hamilton testified that some hernias are congenital, some are caused by trauma, and some are caused by defects in the abdominal wall. The doctor also indicated that some hernias manifest themselves instantaneously but others develop gradually due to repeated stress such as from lifting. What is more, an asymptomatic hernia may become symptomatic from a triggering event such as lifting. The doctor testified, in part:

³ Engelken Depo. at 13.

⁴ Mock Depo., Ex. 1.

Q. (Ms. Fisher) Okay. Is the fact that [the hernia] becomes painful indicative that the hernia is getting worse? Does something have to happen to a hernia, assuming a hernia is preexisting?

A. (Dr. Hamilton) Sure.

Q. Does the hernia have to get worse for it to go from asymptomatic to symptomatic?

A. Probably to start pressing on a nerve. I don't know if it means it's larger, but you usually will have pain related to it. When usually around some event involving lifting or something like that, that will trigger it.⁵

The only other doctor to testify in this claim, Dr. Engelken, stated that a hernia is a tearing of the abdominal wall; accordingly, continued lifting and straining can cause the tearing to progress and the hernia to become larger.

The Board finds the greater weight of the evidence establishes that it is more probably true than not that the work claimant performed for respondent between January 3 and March 22, 2007, aggravated her inguinal hernia and precipitated the need for medical treatment. Claimant's testimony is credible that her work required lifting and straining and that as she continued to work her symptoms progressively worsened until she was in severe pain. What is more, the medical testimony establishes that lifting and straining can cause further tearing in the abdominal wall and a progressive worsening of the hernia. The Board finds that is what probably occurred in this instance; namely, the lifting and straining claimant did at work.

CONCLUSIONS OF LAW

It is the intent of the legislature that the Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions.⁶

The Act defines "accident" as being an undesigned, sudden and unexpected event or events but not necessarily accompanied by a manifestation of force.⁷ Moreover, the term "accident" should not be construed strictly or literally.

⁵ Hamilton Depo. at 12, 13.

⁶ K.S.A. 2006 Supp. 44-501(g).

⁷ K.S.A. 2006 Supp. 44-508(d).

The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.⁸

And the Act defines “injury” as any lesion or change to the body that causes damage or harm. But it is not essential the injury be visible.⁹

The Board concludes claimant sustained repetitive trauma while performing her regular work duties as a corrections specialist and that such repetitive trauma comprised an accident that resulted in injury as those two terms are defined by the Act.

Respondent contends claimant failed to provide timely notice of her accident. The Act provides that a worker has 10 days following the date of accident to notify the employer of the accident. That period may be extended, however, for *just cause*.¹⁰

Because claimant’s accident resulted from repetitive trauma, the Act fixes the date of accident. The Act provides, in part:

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker’s right to make a claim for aggravation of injuries under the workers compensation act.¹¹

⁸ *Id.*

⁹ K.S.A. 2006 Supp. 44-508(e).

¹⁰ K.S.A. 44-520.

¹¹ K.S.A. 2006 Supp. 44-508(d).

Dr. Hamilton began treating claimant after a referral from claimant's personal physician, Dr. Engelken. There is no evidence that Dr. Hamilton had been authorized by respondent as claimant's treating physician any time before she left work for her March 22, 2007, hernia surgery. Accordingly, the above statute designates February 7, 2007, as the date of accident for this repetitive trauma injury as that is when claimant provided a written statement to respondent and, thus, gave respondent *written notice* of her injury.

Claimant's written notice on February 7, 2007, set the accident date. As notice was given respondent the same day as the designated date of accident, notice to respondent was clearly timely.

In conclusion, claimant injured herself working for respondent in an accident that arose out of and in the course of her employment. And claimant provided respondent with timely notice of the accident. Accordingly, claimant is entitled to receive workers compensation benefits, including temporary total disability benefits and medical compensation, for her right inguinal hernia. The December 9, 2008, Award should be reversed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹² Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board reverses the December 9, 2008, Award and finds that claimant is entitled to receive workers compensation benefits for her right inguinal hernia.

Keisha L. Mock is granted compensation from Shawnee County for a repetitive trauma injury with a date of accident of February 7, 2007. Based upon an average weekly wage of \$678.41, Ms. Mock is entitled to receive 5.71¹³ weeks of temporary total disability benefits at \$452.30 per week, or \$2,582.63, for a hernia, making a total award of \$2,582.63, which is all due and owing less any amounts previously paid.

Claimant is entitled to payment of the reasonable and necessary medical expense she incurred for treatment of her hernia, subject, of course, to the fee schedule promulgated by the Division of Workers Compensation.

¹² K.S.A. 2008 Supp. 44-555c(k).

¹³ This number of weeks of temporary total disability benefits has been previously paid and the number of weeks was not raised as an issue by either party.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum.

Additional medical benefits may be considered upon proper application to the Director.

The record contains a fee agreement between claimant and her attorney. Under K.S.A. 44-536(b), claimant is entitled to such fee as approved by the Director.

The Board adopts the order assessing administrative costs set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of April, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Larry G. Karns, Attorney for Respondent
Brad E. Avery, Administrative Law Judge